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**IN THE
COURT OF APPEALS OF INDIANA**

JARED BAILEY,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 49A02-0609-CR-795
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant Hawkins, Judge
Cause No. 49G05-0605-FC-92877

July 11, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Jared Bailey appeals two convictions of forgery as Class C felonies¹ and three convictions of theft as Class D felonies.² We affirm.

Issue

Bailey raises a single issue for our review, which we restate as: whether the trial court abused its discretion in admitting certain evidence disclosed by the State during trial.

Facts and Procedural History

After 4:40 p.m. on May 2, 2006, Kenneth Cochran locked his wallet in a locker at the National Institute for Fitness and Sport (NIFS) on the IUPUI campus. At the time, Bailey was the only other person in the locker room, sitting two or three feet away. Cochran left the locker room to work out. Upon returning, he found that the locker had been forced open. Two forms of identification, a credit card, and his bank card were missing. Ultimately, two unauthorized transactions were completed on his bank card at Style ‘N Mens Wear in Lafayette Square Mall (“SNMW”).

After an investigation, the State charged Bailey with three counts of forgery as Class C felonies and four counts of theft as Class D felonies.³ On May 26, 2006, the trial court conducted the initial hearing, at which time Bailey moved for a speedy trial. The State filed notices of discovery compliance on June 1 and 15, 2006. On July 12, 2006, the State deposed Jackeline Alvarenga, the SNMW clerk who processed the two unauthorized charges. During the deposition, Bailey’s attorney questioned Alvarenga about two receipts that

¹ Ind. Code § 35-43-5-2(b).

² Ind. Code § 35-43-4-2.

showed the transactions to have occurred at 4:46 p.m. and 4:53 p.m.

Four or six days prior to the bench trial,⁴ Bailey filed his Notice of Intent to Offer Defense of Alibi, stating that he was at NIFS from 4:52 p.m. until 5:45 p.m. on the date of the incident. During the second day of the trial, the State gave copies of different receipts for the same transactions to Bailey's attorney and moved to admit them during direct examination of Alvarenga. This second set of receipts listed the items purchased and reflected later transaction times, 6:48 p.m. and 6:55 p.m. Regarding the two pairs of receipts, Alvarenga testified that the store's procedure was to give the customer two receipts for each purchase made with a credit card; one generated by the cash register and one generated by the credit card transaction. She further testified that she had noticed that the itemized, cash register receipts were consistently correct, while the credit card receipts were consistently inaccurate. Initially, her testimony was unclear whether the time varied by one or two hours. Under questioning by the trial court, however, Alvarenga clarified that for a hypothetical credit card purchase made at 3:00 p.m., the credit card receipt would inaccurately reflect a transaction time of approximately 1:00 p.m. This testimony supported the State's argument that the transactions actually occurred at 6:48 p.m. and 6:55 p.m., undermining Bailey's defense that he was at NIFS when the transactions were made.

Bailey's attorney objected to admission of the itemized, cash register receipts and Alvarenga's testimony concerning them, arguing that the State had violated a discovery order by not disclosing the itemized receipts until the second day of trial and arguing that they were

³ The trial court allowed the State to amend its charges to correct a clerical error in noting the year of the alleged conduct.

⁴ Bailey waived his right to trial by jury.

not admissible as business records. The State acknowledged that it had received the itemized, cash register receipts reflecting later transaction times in June, prior to Alvarenga's deposition. When the trial court asked the State to explain why the itemized receipts were turned over during the second day of trial, the State indicated that it was "an oversight." Trial Transcript at 78. After argument focusing on the admissibility of the itemized receipts as business records, the trial court admitted the itemized receipts and rebuked the State for the discovery violation. Bailey, however, did not move for a continuance.

After a bench trial, the trial court found Bailey guilty of two counts of forgery and three counts of theft,⁵ and sentenced him to five years imprisonment for each count of forgery and two years imprisonment for each count of theft, with all five sentences to be served concurrently. During the sentencing hearing, the trial court indicated that the itemized, cash register receipts were "very assistive in the State's case." Tr. at 131. The trial court concluded, and Bailey acknowledged, that the State's discovery violation was not deliberate. Bailey now appeals.

Discussion and Decision

I. Standard of Review

We review the trial court's consideration of a discovery violation with significant deference.

The trial court has broad discretion in dealing with discovery violations and may be reversed only for an abuse of that discretion involving clear error and resulting prejudice. Generally, the proper remedy for a discovery violation is a continuance. Exclusion of the evidence is an extreme remedy and is to be

⁵ The trial court found Bailey not guilty of one count of forgery and one count of theft, both alleged to have occurred at a different store.

used only if the State's actions were deliberate and the conduct prevented a fair trial.

Berry v. State, 715 N.E.2d 864, 866 (Ind. 1999) (internal citations omitted); see also Williams v. State, 714 N.E.2d 644, 649 (Ind. 1999), cert. denied, 528 U.S. 1170 (2000). “Failure to request a continuance, where a continuance may be an appropriate remedy, constitutes a waiver of any alleged error pertaining to noncompliance with the trial court’s discovery order.” Fleming v. State, 833 N.E.2d 84, 91 (Ind. Ct. App. 2005) (citing Warren v. State, 725 N.E.2d 828, 832 (Ind. 2000)).

II. Analysis

Bailey argues that the trial court abused its discretion over discovery violations in admitting the State’s Exhibits Four and Five (itemized receipts), as well as Alvarenga’s testimony regarding them. While Bailey objected to the admission of the itemized, cash register receipts, he did not move for a continuance. Citing Warren, the State argues that Bailey’s omission to move for a continuance waived the issue. Bailey responds that he did not waive the issue because the second day of the trial was held on the deadline for a speedy trial and a continuance would have compromised his rights to the same. See Ind. Crim. Rule 4(B)(1) (providing that a criminal defendant moving for a speedy trial shall be discharged if not “brought to trial” within seventy days of his motion). However, Bailey’s two-day trial occurred on the sixty-sixth and seventieth days from the date of his motion. This Court has held that the term “brought to trial” constitutes the date upon which the jury is selected and sworn and that thereafter, the State may move for a continuance without violating Indiana Criminal Rule 4(B)(1). Robinson v. State, 180 Ind. App. 555, 389 N.E.2d 371, 374 (1979).

Accordingly, we are not persuaded by Bailey's argument that his request for a speedy trial alleviated his later omission to seek a continuance.

Bailey also argues that a continuance would not have been an appropriate remedy because, depending on the results of any additional discovery, he might have decided to pursue a different theory of his case. As support, he cites Beauchamp v. State, 788 N.E.2d 881 (Ind. Ct. App. 2003). Beauchamp, however, is distinguishable from the facts in this case. At trial, Beauchamp presented his defense, including testimony from an expert. The State then called as a rebuttal witness the same expert, who "offered opinions that substantially differed from those he provided in his deposition." Id. at 893. This Court held that "a continuance would . . . be futile" because Beauchamp had already presented his defense, and thereby committed to a particular theory of the case. Id. at 894. Here, in contrast, the State was still presenting its case in chief against Bailey when it moved to admit the itemized receipts. Accordingly, a continuance would have been an appropriate remedy as it would have allowed for additional discovery and the opportunity for Bailey to evaluate the propriety of pursuing a particular course of action. We therefore conclude that Bailey waived this argument by failing to move for a continuance.

Waiver notwithstanding, it is axiomatic that a defendant is entitled, not to a perfect trial but, a fair trial and in this regard, our Supreme Court has made clear that where a defendant contests the admission of evidence on the basis of a discovery violation, the defendant must show that the State's actions were deliberate and prevented a fair trial. Berry v. State, 715 N.E.2d at 866. Bailey establishes neither element. To the contrary, his attorney acknowledged at the sentencing hearing that "I don't think that [the prosecutor] withheld it, I

don't think it was bad faith . . .” Tr. at 132. Furthermore, the trial court stated that “in other cases pending in this court, there had been significant discovery violations and in one case in particular we have since made a finding that there was bad faith. I don't think that's the case here.” Tr. at 130. The State's discovery violation was not deliberate.

Bailey's attorney cross-examined Alvarenga at length regarding the different pairs of receipts and the discrepancy in the times noted on them. Under questioning by the trial court, Alvarenga discussed these discrepancies in a manner that supported the State's case. Cochran testified that Bailey was the only person in the locker room with him at the time he placed his bank card in the locker at NIFS. Cochran further testified that he had not made the purchases at SNMW. Alvarenga, an eyewitness, identified Bailey as the purchaser. Bailey has failed to demonstrate that the discovery violation prevented him from receiving a fair trial.

Conclusion

For the above reasons, we conclude that the trial court did not abuse its discretion in admitting certain evidence disclosed by the State during trial.

Affirmed.

SHARPNACK, J., and MAY, J., concur.